

(1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985).

II. FINDINGS OF FACT

2.1 Appellant James Weber is a Stores Clerk for Respondent Department of Retirement Systems (DRS). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on November 2, 2000.

2.2 By letter dated October 27, 2000, John F. Charles, Director of DRS, notified Appellant of his five-month, four-range reduction in salary for excessive personal use of his work telephone. Mr. Charles alleged that Appellant:

[M]ade a total of 464 non-work related telephone calls during regular business hours, totaling 58 hours 56 minutes and 22 seconds. All of these calls were made from [his] work telephone number 664-7067. All but seven of these non-work related telephone calls were made during [his] regularly scheduled work hours, with the remaining seven made during [his] scheduled lunch period.

2.3 On September 17, 2001, Respondent filed a Motion for Dismissal. The Board heard oral argument on the motion, determined that Appellant used state resources to make 464 non-work related telephone calls during regular business hours, and concluded that the factual charges stated in the October 27, 2000, disciplinary letter were true. However, the Board denied the motion because an issue of fact existed regarding whether the level of discipline imposed was appropriate. (See November 1, 2001, Order Denying Respondent's Motion for Dismissal).

2.4 Appellant has been employed by DRS for 18 years. His duties as a Stores Clerk include maintaining the inventory of supplies, stocking the supply room and some driving/delivery tasks.

1 His duties do not generally require the use of the telephone, however, he may need to speak on the
2 telephone with shippers or vendors on an occasional basis.

3 2.5 In addition to his employment with Respondent, Appellant had outside employment as a city
4 council member for the City of Lacey.

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6 2.6 On January 26, 1998, Appellant's Supervisor, Tom Dodson, completed an Employee
7 Development and Performance Plan (EDPP) for Appellant. The EDPP provided Appellant with
8 feedback regarding his performance. Appellant signed the EDPP on January 28, 1998. The EDPP
9 memorialized that Appellant had been counseled regarding his excessive use of work time to
10 conduct personal business. The EDPP also set forth the expectation that Appellant "[c]ontinue to
11 improve further on spending less time conducting personal business while at work."

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13 2.7 By letter dated November 2, 1998, Mark Feldhausen, Assistant Director for Administrative
14 Services, cautioned Appellant that because of his employment as a city council member, the
15 potential existed for issues related to the ethics law. Mr. Feldhausen reminded Appellant that use of
16 state resources for private gain was prohibited and, in relevant part, directed Appellant to operate
17 within the following parameters:

- 18 • If you receive a call related to city business, the caller should be informed
19 that you will return their call during a break or after work. These incoming
20 calls should be completed within two minutes. . . .
- 21 • If you need to make a call related to city business, the outgoing call should
22 only be initiated during a break or after work. These calls must be completed
23 within the duration of the break.

24 2.8 DRS has a system that records the number and duration of all telephone calls in and out of
25 the agency. Mr. Charles holds agency managers accountable to ensure their staff are appropriately
26 using the telephone system. Mr. Charles expects managers to review monthly telephone usage by
their staff. A customary review of Appellant's telephone showed that Appellant's use was

1 excessive. As a result, an internal auditor conducted an investigation. The investigation revealed
2 that during the period of September 1, 1999, through August 4, 2000, Appellant made 464 outgoing
3 calls for a total duration of almost 59 hours, and he received 22 hours of incoming calls. Over 55 of
4 the calls were longer than 20 minutes each in duration.

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6 2.9 Mr. Charles concluded that Appellant's telephone use was excessive and by letter dated
7 September 22, 2000, Mr. Charles notified Appellant that he was considering taking disciplinary
8 action against him. Mr. Charles provided Appellant with the specific charges being considered,
9 with a copy of the internal auditor's report on Appellant's telephone usage, and with copies of the
10 relevant laws and DRS policies. In addition, Mr. Charles scheduled an October 16, 2000 pre-
11 disciplinary meeting to allow Appellant an opportunity to respond to the charges. Appellant chose
12 not to attend the October 16, 2000 meeting, however, he provided written information that Mr.
13 Charles considered.

14
15 2.10 Mr. Charles reviewed Appellant's employment history and found that he had been counseled
16 regarding excessive use of work time for personal business and that he had a history of defying
17 authority. Mr. Charles determined that Appellant admitted to making the calls but did not take
18 responsibility for his actions being contrary to policy or to the expectations set forth by his
19 supervisors. Mr. Charles concluded that a progressive level of discipline was necessary to impart to
20 Appellant the seriousness of his misconduct. Mr. Charles decided to impose a monetary sanction
21 equivalent to the hours of work time that Appellant used for personal telephone calls.

22 2.11 By letter dated October 27, 2000, Mr. Charles notified Appellant of his reduction in salary
23 effective November 13, 2000 through April 12, 2001.
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1 2.12 DRS Policy DRS-ISD-1 allows employees limited (*de minimus*) personal use of agency
2 electronic communication systems provided the systems are not used to promote outside business
3 interests or personal political beliefs. Policy DRS-Legal-7 prohibits the use of state resources or
4 time for any political activity. In addition, RCW 42.52.160 and WAC 292-110-010 prohibit the use
5 of state resources for private benefit or gain including outside business or political activities.
6 Appellant was aware of these policies and regulations.

7 8 **III. ARGUMENTS OF THE PARTIES**

9 3.1 Respondent argues that Appellant was given warnings and clear expectations regarding the
10 personal use of the telephone during work hours and that he was aware of the relevant policies and
11 regulations. Respondent asserts that, however, Appellant refused to comply with policies and
12 directives and persisted in engaging in activities that had nothing to do with his DRS job duties and
13 responsibilities while being paid by the taxpayers of Washington. Respondent asserts the
14 Appellant's use of work time and resources for personal telephone calls was excessive and contends
15 that formal discipline was necessary to convey to Appellant the seriousness of his misconduct.
16 Respondent argues that the appointing authority imposed a lenient sanction against Appellant in
17 spite of Appellant's history of warnings and his refusal to comply with directives. While
18 Respondent suggests that a steeper level of discipline would have been appropriate, in this case,
19 Respondent asserts that the reduction in salary is sufficient to send the message to Appellant that
20 using work time and resources to engage in personal activities is not appropriate.

21 3.2 Appellant argues that management should be held accountable for its shortcomings and
22 asserts that the agency failed to treat him with respect, fairness, honesty and consistency. Appellant
23 contends that management failed to provide him with timely performance evaluations, failed to give
24 him a "Loudermill" hearing, and failed to follow a course of progressive discipline. Appellant
25 asserts that he has been obstructed in his efforts to bring forth the truth of management's
26 misconduct. Appellant contends that he was never counseled regarding his telephone usage, that he

1 has no scheduled break times, and that he should not be expected to work within specific
2 parameters when those parameters have not been made known to him. Appellant further contends
3 that Respondent provided no evidence that his telephone usage was for political or personal gain.
4 Appellant also contends that since this incident, he has purchased a cellular telephone and no longer
5 uses state resources for personal calls. Appellant argues that the disciplinary action was not
6 reasonable and suggests that if he had engaged in the misconduct alleged by Respondent, he should
7 have been fired.

8 9 IV. CONCLUSIONS OF LAW

10 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
11 herein.

12 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
13 the charges upon which the action was initiated by proving by a preponderance of the credible
14 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
15 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
16 Corrections, PAB No. D82-084 (1983).

17 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
18 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
19 of Social & Health Services, PAB No. D86-119 (1987).

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21 4.4 Inefficiency is the utilization of time and resources in an unproductive manner. Girod v.
22 Dep't of Social & Health Services, PAB No. D91-003 (1991), appeal dismissed, Thurston Co.
23 Super. Ct. No. 91-2-02922-6 (1993).

1 4.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior
2 and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v.
3 Dep't of Social and Health Services, PAB No. D94-025 (1995).

4 4.6 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
5 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

6
7 4.7 Willful violation of published employing agency or institution or Personnel Resources
8 Board rules or regulations is established by facts showing the existence and publication of the rules
9 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
10 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &
11 Health Services, PAB No. D93-053 (1994).

12 4.8 Respondent has met its burden of proof that the level of discipline imposed was appropriate.
13 Appellant was aware of the expectations and had been cautioned about using work time to conduct
14 personal business. Respondent has shown that Appellant neglected his duty, was inefficient and
15 insubordinate when he failed to comply with agency policies and management directives to curtail
16 his use of agency time and resources to conduct personal business. Appellant was made aware of
17 the expectations, policies and regulations regarding the use of state resources for personal business,
18 yet he persistently failed to abide by them. Appellant's actions were flagrant and rose to the level of
19 gross misconduct. Considering Appellant's excessive personal use of state time and resources, his
20 history of prior warnings, and his blatant refusal to comply with management directives, we find
21 that an appropriate course of progressive discipline was followed and that the reduction in salary
22 imposed was appropriate. Therefore, we affirm the appointing authority's decision to impose the
23 reduction in salary.
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1 4.9 As a defense, Appellant raises management's failure to provide him with timely performance
2 evaluations and failure to follow agency policies. However, Appellant did not file a timely rule
3 violation appeal. Furthermore, management's alleged actions do not mitigate Appellant's
4 misconduct. The record is clear that, on numerous occasions, management did address the issue of
5 appropriate use of state time and resources with Appellant.

6 4.10 Appellant also asserts that he was not provided a "Loudermill" hearing. Cleveland Board of
7 Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), requires notice, an
8 explanation of the evidence, and an opportunity for the employee to present his or her side of the
9 story prior to the decision being made to terminate an employee. Mr. Charles' September 22, 2000
10 letter and the October 16, 2000 pre-disciplinary meeting, which Appellant chose not to attend,
11 satisfied the requirements for a "Loudermill" hearing.

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13 4.11 Under the facts and circumstances of this case, the appeal should be denied.

14
15 **V. ORDER**

16 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of James Weber is denied.

17 DATED this _____ day of _____, 2002.

18 WASHINGTON STATE PERSONNEL APPEALS BOARD

19
20 _____
21 Walter T. Hubbard, Chair

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23 _____
24 Gerald L. Morgen, Vice Chair

25
26 _____
Leana D. Lamb, Member